38 Box 8 - [JGR/*Chadha* re: District of Columbia] (2) - Roberts, John G.: Files SERIES I: Subject File

U.S. Department of Justice

United States Attorney
District of Columbia

United States Courthouse, Room 2800
Constitution Avenue and 3rd Street N.W.
Washington, D.C. 20001

11-2-83

Dick:

This is a very rough first cut, with no typo corrections, editing, etc.

Joe

Memorandum

Subject	Date
H.R. 3932, A Bill to Amend the District of Columbia Self-Government and Government Reorganization Act	November 1, 1983

To Robert McConnell
Assistant Attorney General
Office of Legislative Affairs

From Joseph E. diGenova
Principal Assistant
United States Attorney

On October 17, 1983, William V. Roth, Jr., Chairman of the United States Senate Committee on Governmental Affairs, sent to the Department for comment and review H.R. 3932, a bill to amend the District of Columbia Self-Government and Government Reorganization Act. The bill passed the House of Representatives on October 4, 1983 and was sent to the Senate for consideration. On October 20, 1983, our office was asked to comment on the legislation.

This legislation was introduced to deal with the perceived constitutional infirmities in the D.C. Self-Government Act* resulting from the United States Supreme Court's decision in INS v. Chadha, No. 80-1832, slip op. (U.S. June 23, 1983) which struck down the one house veto provision of Section 244 (c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254 (c)(2). The D.C. Act was thrown into question by virtue of the fact that it contains four provisions reserving to Congress unilateral authority over certain matters. These are:

(1) Section 303(b) provides that "an amendment to the charter . . . shall take effect only if . . . both Houses of Congress adopt a concurrent resolution . . . approving such amendment."

*Pub. L. 93-198, 87 Stat. 774 (1973).

(2) Section 602(c)(1) provides that with respect to acts effective immediately due to emergency circumstances and acts proposing amendments to Title IV of this Act "no such act shall take effect until the end of the 30-day period . . . and then only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act."

(3) Section 602(c)(2) provides that any Act affecting Titles 22, 23, or 24 of the District of Columbia Code "shall take effect . . . only if . . . one House of Congress does not adopt a resolution disapproving such act."

(4) Section 740(a) provides that either the House or the Senate may adopt a resolution terminating emergency presidential authority over the Metropolitan Police Department.

While we believe that Chadha can be distinguished from the situation involving Congress' unique plenary relationship to the District of Columbia under Article I, Section 8, Clause 17 of the U.S. Constitution,* and that therefore the legislative veto

* Chadha, in our view, is distinguishable. The Supreme Court noted in its opinion that "(n)ot every action taken by either House is subject to the bicameralism and presentment requirements of Art. I." (Slip op., at 31). Section 244(c)(2) was declared unconstitutional because "it was essentially legislative in purpose and effect." (Id. at 32). This was so because in exercising Article I power over naturalization, the "House took action that had the purpose and effect of altering the legal rights, duties and relations of persons . . . . altering the legal rights, duties and relations of persons . . . . all outside the legislative branch." (Id.) (Emphasis supplied.) The Court furthered noted that when the Attorney General performs his duties pursuant to § 244, "he does not exercise 'legislative' power." (Id. at 32-33, n. 16). Finally, the Court emphazied that when the framers of the Constitution intended to authorize either House "to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." (Id. at 35). After listing the four explicit and unambiguous provisions of the Constitution in this exception, the Court explained:

provisions in the D.C. Self-Government Act could, in our view be sustained, we understand that the Department does not wish to proffer such arguments in the context of other ongoing litigation involving policy matters of wider application. For that reason, we offer only suggestions as to how the Department might constructively and creatively deal with the serious and vital questions of maintaining and protecting the federal interest in criminal law enactments for the District of Columbia by offering amendments to H.R. 3932. This is done with the strong conviction that the President, the Department, the Congress and particularly this office have essential interests in maintaining the intergrity of the City's legislative process. Those interests revolve around the unquestioned unique character of this the only federal city.

(Footnote contiued.)

> One might also include another "exception" to the rule that Congressional action having the force of law be subject to the bicameral requirement and the Presentment Clause. Each House has the power to act alone in determining specified internal matters. Art. I, §7 cl. 2, 3, and §5, cl. 2. However, this "exception" only empowers Congress to bind itself. (Id., n. 20) (Emphasis supplied).

In the case of the legislative veto provisions in the D.C. Act, Congress does not take action that affects the legal rights of persons "outside the legislative branch." The City Council is nothing more, under the home rule scheme, than a committee to Congress. It is, therefore, exercising power over "specified internal matters" when it reviews City Council legislation through the prescribed veto process. In addition, there is no delegation of authority to any person in the Executive Branch of government. The "committee power" given to the City Council is internal in nature and remains for purposes of review and ratification within the Congress at all times. Hence, neither separation of power nor presentment clause infirmities arise.

The special relationship to the District of Columbia which Congress enjoys under the Constitution provides additional reason for believing that the veto provisions in the D.C. Act are valid. The courts have said that Congress' authority over the District of Columbia resembles that of a state legislature.

(Footnote continued.)

The Supreme Court, for example, has declared that "Congress may exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." Palmore v. United States, 411 U.S. 389, 397 (1973). See also O'Donoghue v. United States, 289 U.S. 516, 545 (1933) and Stoughtenborough v. Hennick, 129 U.S. 141, 147 (1889); cf. American Insurance Co. v. Canter, 26 U.S. 511 (1828)(Congress acts as both the general and the state government of territories).

If Congress acts as a state legislature in the District of Columbia, it is not bound by the federal constitutional requirements of presentment and bicameralism. For example, in passing on whether a local court for the District of Columbia authorized by Congress was subject to Article III requirements of judges with lifetime tenure and immunity from diminution of salaries, the Supreme Court categorically proclaimed that

> the power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual in the context of national legislation enacted under other powers delegated to it under Article I, sec. 8.

Palmore v. Unitee States, 411 U.S. at 397, 398 (1973). Furthermore, with respect to taxing residents of the District for local purposes, the Court has recognized that Congress may act as a state legislature unrestricted by constitutional provisions. See Gibbons v. District of Columbia, 116 U.S. 404, 408 (1886).

More recently, the Court underscored the expansive nature of this Congressional power over the District of Columbia by noting that "the 'plenary authority' under the District of Columbia Clause Art. I, §8, cl. 17 . . . encompasses the full authority of government, and thus, necessarily the executive and judicial powers as well as the legislative." Northern v. Pipeline Co. v. Marathon Pipe Line, 102 S.Ct. 1258, ____, 73 L.Ed. 598, 618 (1982). This is a power unique indeed, "different in kind from the other broad powers conferred on Congress" and so special that it is "clearly possessed by Congress only in limited geographic areas." (Id.)

H.R. 3932, inter alia, amends the D.C. Self-Government Act by substituting for the various concurrent resolution and one house resolution veto provisions a single joint resolution of disapproval as the method by which Congress could overturn any legislative action by the City Council. As Congressman Fauntroy put it during the debate on H.R. 3932:

> Mr. Speaker, the basic thrust of H.R. 3932 is simple. In each instance in the D.C. Home Rule Act where a legislative veto is allowed, it is stricken, and in its place is inserted the requirement for "joint resolution." The import of this change is that in order for the Congress to reject an act of the District of Columbia Council, both Houses of Congress must affirmatively act by joint resolution, and the joint resolution must be presented to the President. (Cong. Rec., H7904, October 4, 1983).

This would certainly comport with the strictures of Chadha and we would suggest that in all but one area of concern such a mechanism would suffice. That area is Council enactments dealing with the Criminal law by amendments to Titles 22, 23 and 24 of the District of Columbia Code.

The debates in Congress over the D.C. Self-Government Act reveal a profound concern for preserving Congress' unique, constitutionally established legislative authority over the District of Columbia. See 119 Cong. Rec. H33352, passim (1973).*

---

* Indeed, were we able to argue on the merits the entire question of the constitutionality of the legislative veto provisions in this act, we would conclude that if they did not pass constitutional muster then the entire Self-Government Act must fall because those provisions were seminal to the granting of "home rule." It is clear that Congress never would have delegated these legislative authorities to the City Council had it known that the retention of these vetos was improper. The severability question would almost surely have to be resolved in Congress' favor thus striking down the delegation under the changed circumstances never contemplated by Congress. This conclusion is unescapable since Congress included no severability clause in the 1973 Act. H.R. 3932 would cure this defect and insert such a clause now.

special treatment of T. 22, 23, & 24 in part

More particularly, in only one area did Congress reserve to itself the right to veto by vote of only one house the acts of the City Council and that was with regard to criminal law and procedure and prisoners, Titles 22, 23 and 24 D.C. Code. The legislative history dealing with Congress' concern about the criminal law and its intention to carve out this area for special consideration is unequivocal. See Home Rule For The District Columbia 1973-1974, Background and Legislative History of H.R. 9682, and Relatee Bills Culminating in the District of Columbia Self-Government and Governmental Reorganization Act (Public §Law 93198§0, 93rd Cong., 2d. Sess.,(Dec. 31, 1974)(pp. 1443-44, 1455, 1459, 1477, 1499, 1605, 1657 as to general powers and reservations, and pp. 1676, 1778-79, 2084, 2099, 2117, 2140, 2318, 2890, 2892, 2902, 2917, 2923, 2937, 3013, 3034, 3041, 3054, 3062, 3086, 3114, 3168-69, 3939-41 as to limitations in area of criminal law and procedure and prisoners). See also, 119 Cong. Rec. 333353, 33357-59, 33364, 33385, 33408 (1973). The original bill enacted by the House, in fact, prohibited the soon to be established City Council from legislating in the criminal law area at all. The Senate version contained no such prohibition. The conference version of the final bill represented a compromise and retained a one house veto as the method of protecting the federal interest. Moreover, during the first two years of self-government, the Council was prohibited from legislating in this area while a study of the District of Columbia Criminal Code was undertaken for the Congress. (Secs. 602(a)(9) and 602(c)(2).

H.R. 3932 deals with the one house veto in this critical area of legislative authority of the Council by providing for a joint resolution of disapproval in subsection (d). It is our considered judgment that, because of the carefully crafted history of Congress' concern with the Councisl's authority in the criminal law area, any such enactments of the Council should only be permitted to become law upon passage by the Congress of a joint resolution of approval. This would serve to vindicate that special interest manifested by the legislative history of the D.C. Self-Government Act. It is not, we add, merely Congress' interest here which is to be protected. The Department, because of the unique enforcement responsibilities of the United States Attorney for the District of Columbia, has as much if not more interest in insuring that any legislation enacted by the Council does not run afoul of vital federal interests.

For example, in 1979 the Council passed the Location of Chanceries Act whicn interfered with the traditional imperatives of the United States Department of State to control the location of foreign missions within the confines of the seat of government. The ensuing erruption of federal concern manifested in the House and Senate and the Department of State led to a resolution overturning this local legislative incursion into sensitive prerogatives. In 1981, the Council passed a Sexual Assault Reform Act. Among its more notorious provisions was one which lowered the age of consent for minors in statutory rape cases. Another "reform" would have reduced the sentence for both forcible and statutory rape from life to a maximum of 20 years. The penalty for incest was reduced. In an insult to the handicapped and crime victims alike, the statute reduced the penalty forcible rape even further to a 10 years maximum if the victim were physically or mentally incapable of consenting or resisting. There were additional "reforms" in this measure which led to the House of Representatives passing almost immediately a resolution of disapproval. That ended the matter. Such would not be the cases if H.R. 3932 were enacted. Recently, the Mayor and others proposed a series of bills to deal with prison overcrowding. Rather than propose the construction of additional facilities, they proposed a host of measures including premature release of felons, executive power for the mayor, etc. The three acts in question were the Parole Act of 1983 (Bill 5-16), the Prison Overcrowding Emergency Powers Act of 1983 (Bill 5-244) and the District of Columbia Sentencing Improvements Act of 1983 (Bill 5-245).

The Parole Act proposes to release exactly those violent and dangerous criminals who should remain incarcerated for a more substantial period of time by reducing the minimum period of detention to 10 years. Those inmates who are incarcerated for more than a minimum of 10 years under current law are murderers rapists, and armed offenders. This Bill would advance most of their release dates by at least four to five years, and, as statistics prove that the majority of those released will victimize others relatively soon after release, passage of the Bill would pose a clear and present daner to the community.

The Prison Overcrowding Emergency Act would allow the Mayor, as a means of budget control, to release dangerous prisoners into the community. Reduced to its essence, this Bill would sacrifice the safety of the community on the altar of fiscal irresponsibility. Remarkably, the Bill provides for repeated acts of reducing sentences by 90 days, even for persons who have no chance of being released immediately as a

result. For those prisoners who are not within 90 days of parole eligibility, the existence of an undefined "emergency" would result in reducing their ultimate sentences for no good reason, and would not assist in solving the immediate problem of reducing prison congestion.

Finally, the D.C. Sentencing Improvements Act is unwise and probably illegal. In extending the time for granting a motion to reduce sentence from 120 days to one year, following ultimately could be a denial of a petition for a writ of certiorari to the Supreme Court years after the conviction, this Bill would make a mockery of the time-honored concept of certainty in sentencing, and would undermine the very purpose of deterrance that underlies the act of sentencing. If this Bill were to pass, defendants would be on notice that the criminal justice system in the District of Columbia may be manipulated to exact minimal punishment, and the deterrent effect of other actions taken by the city will deteriorate. For these reasons, among others, this Bill is unwise. It is illegal because the Council does not have the power to amend the Superior Court Rules which govern the filing of sentence reduction motions. Section 946 of Title 11 of the D.C. Code states that the Federal Rules of Criminal Procedure shall apply in Superior Court except as otherwise authorized by the District of Columbia Court of Appeals. The Home Rule Act provides that the Council of the District of Columbia may not alter Title 11. District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code, Title VI, §602(a)(4). (See Harris Opposition, Appendix A.)

While this Office strenuously opposed those items and Council action is still possible, were the new mechanism in effect under H.R. 3932, it is highly unlikely that both houses of congress should be energized to deal with this matter.

Proponents of H.R. 3932 should have no objection to our proposed solution to this delicate problem. Their concerns lie most particularly on whether or not the District can issue bonds to generate reveneu. Certain measures enacted by the Council appear to be in jeopardy as a result of Chadha and the prime interest of the City is in resolving any doubt as to the validity of bond issues. Chairman Dellums said during the debate on the bill:

~~and Council action is still possible,~~

> Mr. Speaker, this Bill corrects a defect in the Home Rule Act that puts a cloud over the ability of the city to go to the bond market to sell its bonds. The cloud to which I refer, Mr. Speaker, is created by the U.S. Supreme Court decision in the so-called Chadha case insofar as that decision relates to the District of Columbia.
>
> Cong. Rec., H7904, October 4, 1983.

Congressman Fauntroy echoed similar reasons for enactment of H.R. 3932:

> It is, however, urgently needed. The District has been working diligently to get itself into the municipal bond market with a reasonable bond rating. In the wake of Chadah (sic), the District has been unable to secure an "unqualified" legal opinion from bond counsel. The absence of an unqualified legal opinion would render any bond issue the District sought to make effectively unmarketable-no one would buy the bonds. The District has Housing Finance Agency bonds ready to go and will shortly be prepared to go to the market with other types of bonds. If our goal of terminating expensive borrowing by the District from the Fedeal Treasury is to be achieved, we must act to clean up the Chadha problem. (Id.)

This goal, which we support, is accomplished in the bill, H.R. 3932, by Section 1, subsection (i) which merely ratifies all past enactments of the City Council and thus by incororation all bond measures previously enacted by that body. The language reads:

> (i) The amendments made by this section shall not be applicable with respect to any law, which was passed by the Council of the District of Columbia prior to the date of the enactment of this Act, and such laws are hereby deemed valid, in accordance with the provisions thereof, notwithstanding such amendments.

This saving clause thus legitimatizes all prior bond-related measures of the Council and solves that most important problem

bonds and revenue anticipation notes (RANS). The District will have a dire need to raise cash, on a short-term basis, during the December/January period and is planning to issue RANS to meet that need, rather than seeking interest-free loans from the U.S. Treasury as in the past. Fiscal year 1984 is the first time the District has gotten this far in issuing RANS. The District's bond counsel, however, has stated that it cannot issue a favorable opinion on the validity of a bond/note issue because of the potential impact of the Chadha decision on D.C. Council actions. The marketability of municipal bonds and notes is dependent on a determination that the contractual debt obligations of the issuer are valid under existing law. The District has been advised by its financial adviser that the inability to secure such an unqualified legal opinion would make such bonds and notes effectively unmarketable. The enactment of H.R. 3932 would remedy this problem.

-- Justice Department and White House Counsel Position on H.R. 3932

The Justice Department and White House Counsel strongly object to the House-passed version of H.R. 3932, because they believe that D.C. acts involving criminal matters should be treated differently than other D.C. acts. H.R. 3932 treats essentially all D.C. acts the same. Justice has given us its views informally and White House Counsel, per John Roberts, agrees with Justice.

Justice urges that H.R. 3932 be amended to provide that any act passed by the D.C. Council which amends the D.C. criminal code not go into effect unless it is positively enacted into law by the U.S. Congress (i.e., passed by both Houses of Congress and signed by the President). This is in contrast with H.R. 3932 which provides that any D.C. act would go into effect unless disapproved by joint resolution.

Justice believes H.R. 3932 does not allow the Federal government sufficient time and/or authority to review and possibly override D.C. Council actions on laws related to criminal matters. Justice points out that because the District is the national seat of government and therefore a tourist attraction, there is a substantial Federal interest in actions taken by the Council that affect the safety of all citizens and visitors. Justice is also the prosecutor for all criminal matters in the District (both for "local" and Federal laws), and operates the court system and the marshal's service. Because of these responsibilities, Justice is very concerned about any actions taken by the Council involving the determination of illegal acts or sentencing standards.

Justice points out that criminal matters are already given special Federal treatment because under current law, only a one-house veto is needed to override Council acts amending the criminal codes, rather than requiring a two-house override as for most Council acts. Justice is also concerned because of what it considers some potentially irresponsible criminal bills introduced in the Council. It cites especially a bill which was introduced to release all prisoners who have served more than 10 years in prison, regardless of their crime, as a means of reducing the overcrowding in the jails (Mayor Barry was recently cited for contempt of court for failing to reduce the prison overcrowding.)

At Justice's request, we have not discussed the Department's position with D.C. officials. We believe it is correct to say, however, that D.C. would perceive the Justice position as paternalism, at best, and an attempt to undermine true Home Rule for the citizens of D.C.

OMB Staff Views

-- GC and JTP Recommendation

GC (Cooney) and JTP staff agree with Justice and the White House Counsel because that position is consistent with Administration positions taken on other legislation dealing with criminal issues in the District. For instance, the Administration has opposed a bill to transfer the local prosecutorial system to the District. GC notes that the Justice proposal would not interfere with the District's ability to enter the bond market and that criminal law matters constitute only the most minute portion of District legislative actions.

-- LR Recommendation

LR staff disagrees with the recommendation of Justice and White House Counsel. Requiring positive Congressional enactment of all D.C. Council actions on criminal matters could be perceived as a return to pre-Home Rule days when the Federal government did everything for the District, and could characterized by some as insensitivity on the part of the Reagan Administration to the black population. While limiting such a requirement to criminal matters is better than applying it to all issues, it may still prompt vigorous outcries from the District and its friends on the Hill and elsewhere about the paternal nature of these actions and its unfairness. New York City also has a strong Federal and international presence, but is responsible for enacting its own criminal laws, as is every other city and state in the nation.

LR disagrees that requiring positive Congressional enactment of Council criminal acts is the only way to assure adequate Federal review. The bill cited by Justice which would release all prisoners after 10 years is one example of this. First of all, the fact that a bill has been introduced does not mean it will be enacted. Second, that bill would almost certainly be vigorously opposed by the citizens of the District, who only recently approved a mandatory sentencing referendum. Even were the bill to somehow get through the Council and be signed by the Mayor, it is one that the Congress could override under the terms of H.R. 3932. Moreover, minor amendments to the D.C. criminal code would be held up, possibly for months, because the issues were not important enough to attract the attention of the Congress.

Finally, since Home Rule was instituted in 1974, the Congress has overridden only two D.C. Council acts, (although it has debated a few more). These acts concerned foreign chanceries and penalties for sexual assaults. This history belies Justice's concern that the D.C.Government will act irresponsibly on criminal matters. Requiring positive Congressional enactment of all D.C. laws would be an overreaction.

Recommendation

LR staff recommends supporting H.R. 3932 as passed by the House. JTP and GC staff recommend amending the bill to require positive enactment of criminal laws by the Congress.

_____ Support H.R. 3932 as passed by House (i.e., all D.C. acts subject to disapproval by joint resolution) (LR staff)

_____ Amend H.R. 3932 to require positive Congressional action on criminal matters. (Justice, WH Counsel, OMB/GC and JTP staff)

U.S. Department of Justice

Office of Legislative Affairs

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

M E M O R A N D U M

November 7, 1983

TO: Joe de Genova
Principal U.S. Attorney
District of Columbia

Larry Simms
Deputy Assistant Attorney General
Office of Legal Counsel

John Roberts
Assistant Counsel
The White House

FROM: Michael W. Dolan
Deputy Assistant Attorney General
Office of Legislative Affairs

SUBJECT: H.R. 3932 - a bill "to amend the District of Columbia Self Government and Governmental Reorganization Act, and for other purposes."

Attached for your review is a draft letter on H.R. 3932. Would you please call me (633-4787) with any comments as soon as possible.

THE WHITE HOUSE

WASHINGTON

November 3, 1983

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: D.C. Chadha Bill

For your information. Since Horner and Horowitz have signed off on the Justice position, I see no reason not to advance that position at the meeting tomorrow morning. Mike Dolan will be talking with Eileen Mayer to determine who will attend for the Administration - hopefully diGenova and/or John Logan. I've told Dolan of my concern that diGenova's response to the perceived bond crisis may be inadequate, and that we should not further delay getting our position out on the merits.

Attachment

LR disagrees that requiring positive Congressional enactment of Council criminal acts is the only way to assure adequate Federal review. The bill cited by Justice which would release all prisoners after 10 years is one example of this. First of all, the fact that a bill has been introduced does not mean it will be enacted. Second, that bill would almost certainly be vigorously opposed by the citizens of the District, who only recently approved a mandatory sentencing referendum. Even were the bill to somehow get through the Council and be signed by the Mayor, it is one that the Congress could override under the terms of H.R. 3932. Moreover, minor amendments to the D.C. criminal code would be held up, possibly for months, because the issues were not important enough to attract the attention of the Congress.

Finally, since Home Rule was instituted in 1974, the Congress has overridden only two D.C. Council acts, (although it has debated a few more). These acts concerned foreign chanceries and penalties for sexual assaults. This history belies Justice's concern that the D.C.Government will act irresponsibly on criminal matters. Requiring positive Congressional enactment of all D.C. laws would be an overreaction.

Recommendation

LR staff recommends supporting H.R. 3932 as passed by the House. JTP and GC staff recommend amending the bill to require positive enactment of criminal laws by the Congress.

_____ Support H.R. 3932 as passed by House (i.e., all D.C. acts subject to disapproval by joint resolution) (LR staff)

✓ Amend H.R. 3932 to require positive Congressional action on criminal matters. (Justice, WH Counsel, OMB/GC and JTP staff)

Connie — JTP — The GC Counsel & the PPD Counsel live in D.C. Wonder where "LR" lives? M.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

October 27, 1983

MEMORANDUM FOR: CONNIE HORNER
MIKE HOROWITZ

FROM: JANET FOX (LRF)
ANNA DIXON (JTP)

SUBJECT: Administration Position on D.C. "Chadha" Amendments

The recent Supreme Court Chadha decision declaring legislative vetoes unconstitutional affects Congressional review of actions by the District of Columbia (D.C.) Council. H.R. 3932 (Fauntroy (D-D.C.)), which would amend the D.C. legislative veto provisions, has passed the House and is expected to be acted on by the Senate in the next few weeks. Although D.C. strongly favors the House-passed version of H.R. 3932, the Justice Department and White House Counsel want to amend the bill while it is in the Senate. This memorandum requests your guidance on what position the Administration should take on this bill. We request your guidance by Monday, October 31.

Background

-- District Home Rule Act

Under this Act, virtually all acts passed by the District of Columbia Council are subject to disapproval by either one or two Houses of Congress. Such legislative veto provisions are, of course, unconstitutional in light of the recent Supreme Court Chadha decision. The House-passed version of H.R. 3932 would amend the Home Rule Act so that D.C. Council acts would be disapproved only if Congress enacts a joint resolution of disapproval within certain time periods. This is a constitutionally acceptable procedure since joint resolutions are presented to the President for his approval or disapproval.

-- D.C. Position on H.R. 3932

The District strongly supports H.R. 3932 and is anxious for its early enactment because it will facilitate their plans to issue

facing the City in the post-Chadha era quite simply and neatly. We submit that this is sufficient for the time being, and that attempts to amend in an omnibus manner the Self-Government Act without lengthy hearings are unwise and unnecessary in light of the above.

We hasten to add that this proposal does not occur in a vacuum and comes at a time when the District of Columbia government is another area of traditional federal interest. We refer, of course, to the legislation which has been introduced by Representative Mervyn M. Dymally, Chairman, Subcommittees on Judiciary and Education, Committee on the District of Columbia, U.S. House of Representatives, entitled the District of Columbia Judicial and Criminal Justice Reform Act. The proposed bill contemplates radical changes in the administration of the criminal justice system in the District of Columbia which would, inter alia, transfer prosecutive authority for all D.C. Code crime currently prosecuted in the Superior Court from the United States Attorney for the District of Columbia to a new entity, the Attorney General for the District of Columbia; transfer authority to nominate local judges from the President either to the Mayor or in the alternative to have the judges selected by voters in general elections. (See Harris Opposition to Transfer Legislation, Appendix B.) The reasons outlined in our opposition to this proposal, which we will not detail here, give ample reason to be chary of any new system of oversight of legislative enactments of the Council which does not articulate an acceptable vehicle for safeguarding Congressional and Executive interests.

It is, of course, more than just possible that the one house veto in the criminal law area has served as a behavior modifier for the Council. Its mere presence has, provided a healthy check on excessive actions by that body. Its absence, or the absence of an equivalent mechanism, will, in all likelihood relinquish that measure of protection federal interest that has served this City well. We would submit that the proposals we put forth here will serve all of the interested parties well and preserve that unique interest of the federal government in the District of Columbia that is recognized in the Constitution.

DRAFT

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to your request, this letter presents the views of the Department of Justice on H.R. 3932, a bill "to amend the District of Columbia Self Government and Governmental Reorganization Act, and for other purposes," as passed by the House of Representatives on October 4, 1983. We oppose the enactment of this legislation unless it is amended consistent with the discussion set forth below.

H.R. 3932 would amend the District of Columbia Self Government and Governmental Reorganization Act, Pub.L. 93-198, 87 Stat. 774 (1973), as amended, ("Home Rule Act"). The legislation is in response to the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983) where the Court held as unconstitutional a congressional veto provision in the Immigration and Nationality Act which allowed one House of Congress to disapprove an action, delegated to the Attorney General by law, to suspend the deportation of an alien under the Act. 1/ The Home Rule Act contains several provisions for congressional disapproval of actions of the District of Columbia Government. 2/

1/ On July 6, 1983, the Supreme Court invalidated two other legislative veto provisions. See Process Gas Consumers Group v. Consumers Energy Council of America, Nos. 81-2000 et. al. (July 6, 1983), affirming Consumers Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), and Consumers Union, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982).

2/ The Home Rule Act, contains four provisions which may be characterized as legislative vetoes. These are:

(1) Section 303(b) provides that "an amendment to the charter . . . shall take effect only if . . . both Houses of Congress adopt a concurrent resolution . . . approving such amendment."

*footnote 2 continued at bottom of page 2

 DRAFT

H.R. 3932 would permit the District of Columbia ("D.C.") City Council to pass laws amending Titles 22, 23 and 24 of the District of Columbia Code ("D.C. Code"), which relate to the criminal law, criminal procedure and prisoners with Congress and the President able to overturn such action only by passage by Congress and enactment of a joint resolution. Because we believe that amendments to these titles should remain the initial perogative of the Congress and its legislative process, we must object to the bill as drafted.

Under the Constitution, Congress has the exclusive power to legislate for the District of Columbia. Art. I, §8, cl. 17. Pursuant to this authority Congress has enacted Titles 22, 23 and 24 of the D.C. Code. In furtherance of this authority, the Department of Justice, through the United States Attorney for the District of Columbia, has been vested with the prosecutive authority in the United States District Court and the District of Columbia Superior Court. D.C. Code §23-101. Indictments are sought, and prosecutions pursued, in the name of the United States of America. Similarly, this Department, through the U.S. Marshal for the District of Columbia, conducts the service of criminal process, provides court room security, transports prisoners and returns to the District of Columbia defendants arrested in other jurisdictions and wanted for prosecution in the District of Columbia. The U.S. Marshals Service utilizes its authority under law to serve Superior Court felony subpoenas anywhere in the United States. D.C. Code §11-942. Finally, all persons convicted in the District of Columbia are committed to the custody of the Attorney General, who, through the Department's Bureau of Prisons, designates the place of confinement. D.C. Code §24-425. 3/

Footnote 2 continued

(2) Section 602(c)(1) provides that with respect to acts effective immediately due to emergency circumstances and acts proposing amendments to Title IV of this Act "no such act shall take effect until the end of the 30-day period . . . and then only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act."

(3) Section 602(c)(2) provides that any Act affecting Title 22, 23, or 24 of the District of Columbia Code "shall take effect . . . only if . . . one House of Congress does not adopt a resolution disapproving such act."

(4) Section 740(a) provides that either the House or the Senate may adopt a resolution terminating emergency presidential authority over the Metropolitan Police Department.

3/ By agreement with the Government of the District of Columbia most District of Columbia prisoners are sent to the Lorton Reformatory.

DRAFT

The Superior Court of the District of Columbia, where jurisdiction for local offenses rests, is a federal court created pursuant to Article I of the Constitution. Palmore v. United States, 411 U.S. 389, 397 (1973). The judges of the Superior Court and the Court of Appeals are appointed by the President. D.C. Code §§11-102, 11-301, 11-1501(a) and 11-1502. A single jury system for grand and petit juries serve both the Superior Court and Federal District Court. A grant jury of one court may return indictments in the other. D.C. Code §§11-1902, 11-1903(a).

This involvement of the federal interest in the prosecuting and judicial elements of the District of Columbia support the principle that the substantive laws which these entities must enforce and interpret remain within the initial discretion of the Congressional legislative process. This principle recognizes nothing more than what is reflected in the present laws, including the Home Rule Act.

As the Supreme Court, the Congress and the Executive Branches are located in the District of Columbia, it is truly the seat of the nation's government. The federal government owns approximatley 41% of all land in the District. Over 200 buildings are owned or leased by the federal government. Over 445,000 federal employees work in the Washington Metropolitan area. As a result, the District draws both the nation's citizens and those of other countries for purposes ranging from conducting business with the federal government to touring the capital. Moreover, the sizable diplomatic community reasserts the need for the three branches of government to be accountable for the enactment, enforcement and interpretation of the criminal laws governing the District.

Exempting criminal law, its procedure, and prisoners from H.R. 3932's mechanism of Congressional review is not inconsistent with the intent of the Home Rule Act. Maintaining Congress's authority in this area is established in both the law itself and its legislative history. Specifically, in only one area did Congress reserve to itself to veto by vote of only one House the acts of the City Council - Title 22, 23 and 24 of the D.C. Code. Home Rule Act §602(c)(2). See also H.R. Rep. No. 482, 93d Cong., 1st Sess. (1983). In fact, the original bill, as passed by the House of Representatives, prohibited the soon to be established Council from legislating in the criminal law area. H.R. 9682, 93d Cong., 1st Sess., §602(a)(8) (1973). The Senate

DRAFT

version contained no such prohibition. S. 1435, 93d Cong., 1st Sess. (1973). The conference version represented a compromise by inserting a one house veto. Pub.L. No. 93-198, §602(c)(2), 87 Stat. 774 (1973). 4/

Our concerns in these areas do not take place in a vacuum. Presently before the D.C. Council are three bills, Bill 5-16, the Parole Act of 1983, Bill 5-244, the Prison Overcrowding Emergency Powers Act of 1983, and Bill 5-245, the District of Columbia Sentencing Improvements Act of 1983, which raise substantial concern. Bill 5-16 would reduce the minimum period of detention to 10 years and would be applicable to individuals incarcerated for such crimes as rape, murder and armed offenses. Bill 5-244 would permit, as a means of budget control, the release into the community of convicted individuals. Bill 5-245 would expand the time for granting a motion to reduce a sentence from 120 days to one year. While this Department has strongly opposed these proposals, see attached Statement of Stanley S. Harris, United States Attorney for the District of Columbia, before the City Council of the District of Columbia (October 3, 1983), we believe more importantly that Congress, through its legislative process, should actually determine the wisdom of such proposals. 5/

As this Department has previously stated, the ramifications of the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983), require all parties as to review carefully the particular provisions of law at

4/ We also note that during the first two years subsequent to the effective date of the Home Rule Act the Council was prohibited from legislating in this area while a study of the District of Columbia Criminal Code was undertaken for the Congress. This was later extended to four years. See §§602(a)(9) and 602(c)(2) of the Home Rule Act.

5/ In 1981, the D.C. Council passed a Sexual Assault Reform Act. Among its provisions was one which lowered the age of consent for minors in statutory rape cases. Another provision would have reduced the sentence for both forcible and statutory rape from life to a maximum of 20 years. The penalty for incest was reduced. The proposal also reduced the penalty for forcible rape to a 10 year maximum if the victim was physically or mentally incapable of consenting or resisting. The House of Representatives passed a resolution disapproving the proposal. H. Res. 208, 97th Cong., 1st Sess., 127 Cong. Rec. H6762 (1981).

 DRAFT

stake. 6/ It is this Department's sincere belief that the interests of both the District of Columbia and the nation as a whole are better served by reserving to the Congress and its legislative process the perogative to amend the laws of the District of Columbia with respect to crime, criminal procedure and prisoners. We must stress that there is no inherent conflict between the District and federal governments. The issues in H.R. 3932 result more from the unique federal and district relationship embodied in present law. This Department values its representation of the citizens of the District of Columbia and share their goal of ensuring that a fair, efficient and effective criminal justice system be in place. We believe that the Congressional legislative process is more than competent to consider the various issues at stake in the matter. Accordingly, we oppose enactment of H.R. 3932 unless it is amended to reserve to Congress the right to amend Titles 22, 23 and 24 of the District of Columbia Code. 7/

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Attachment

6/ See Statement of Edward C. Schmults, Deputy Attorney General before the Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives (July 18, 1983).

7/ We are sensitive to the need of the District of Columbia to have the ability to raise revenues through the municipal bond market. Section (1)(i) of H.R. 3932 is directed toward ratifying previous actions of the D.C. Council with respect to these bonds. We would suggest, however, that section (1)(i) be clarified so as not to infer that actions of the D.C. Council which were subject to a Congressional resolution as a result of the provisions of the Home Rule Act are ratified.

THE WHITE HOUSE

WASHINGTON

November 8, 1983

MEMORANDUM FOR MICHAEL W. DOLAN
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

FROM: JOHN G. ROBERTS, JR.
ASSOCIATE COUNSEL TO THE PRESIDENT

SUBJECT: H.R. 3932

Attached are suggested revisions to the proposed letter on H.R. 3932. In its current form the letter is far too confrontational. We think it would be better for the tone to be one of general support for H.R. 3932, with the one minor amendment we suggest to make the bill consistent with the treatment of Titles 22, 23 and 24 in existing law. We are not wedded to the precise wording of the suggested changes, but do think the focus of the letter needs to be re-directed.

cc: Richard A. Hauser
Larry Simms
Joseph DiGenova

INSERT: FIRST PARAGRAPH ON PAGE 2

The Administration generally supports the approach of H.R. 3932, which would correct the constitutionally invalid portions of the Home Rule Act by requiring congressional action disapproving acts passed by the D.C. City Council to take the form of legislation passed by both Houses and presented to the President for approval or disapproval. In one narrow area, however, the Administration believes that it would be more consistent with Congress' prior treatment under the Home Rule Act to require affirmative approval of acts passed by the D.C. City Council rather than an opportunity for disapproval. We recommend that H.R. 3932 be amended to provide that City Council laws amending Titles 22, 23 and 24 of the District of Columbia Code -- which relate to criminal law, criminal procedure, and prisoners -- only take effect upon passage by Congress of a joint resolution of approval. This approach will cure the constitutional infirmities pointed out by the Chadha decision, while retaining the special treatment accorded Titles 22, 23, and 24 under the existing Home Rule Act.

U.S. Department of Justice

Office of Legislative Affairs

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

M E M O R A N D U M

November 7, 1983

TO: Joe de Genova
Principal U.S. Attorney
District of Columbia

Larry Simms
Deputy Assistant Attorney General
Office of Legal Counsel

John Roberts
Assistant Counsel
The White House

FROM: Michael W. Dolan
Deputy Assistant Attorney General
Office of Legislative Affairs

SUBJECT: H.R. 3932 - a bill "to amend the District of Columbia Self Government and Governmental Reorganization Act, and for other purposes."

Attached for your review is a draft letter on H.R. 3932. Would you please call me (633-4787) with any comments as soon as possible.

DRAFT

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to your request, this letter presents the views of the Department of Justice on H.R. 3932, a bill "to amend the District of Columbia Self Government and Governmental Reorganization Act, and for other purposes," as passed by the House of Representatives on October 4, 1983. We ~~oppose~~ support the enactment of this legislation ~~unless~~ provided it is amended consistent with the discussion set forth below.

H.R. 3932 would amend the District of Columbia Self Government and Governmental Reorganization Act, Pub.L. 93-198, 87 Stat. 774 (1973), as amended, ("Home Rule Act"). The legislation is in response to the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983), ~~where the Court held~~ which struck down as unconstitutional ~~a congressional veto provision in the Immigration and Nationality Act which allowed one House of Congress to disapprove an action, delegated to the Attorney General by law, to suspend the deportation of an alien under the Act.~~ 1/ The Home Rule Act contains several ~~provisions for congressional disapproval of~~ so-called "legislative veto" devices actions of the District of Columbia Government. 2/

1/ On July 6, 1983, the Supreme Court invalidated two other legislative veto provisions. See Process Gas Consumers Group v. Consumers Energy Council of America, Nos. 81-20008 et. al. (July 6, 1983), affirming Consumers Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), and Consumers Union, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982).

2/ The Home Rule Act contains four provisions which may be characterized as legislative vetoes. These are such devices purporting to authorize Congress to disapprove without complying with the constitutional requirements for legislation.

(1) Section 303(b) provides that "an amendment to the charter . . . shall take effect only if . . . both Houses of Congress adopt a concurrent resolution . . . approving such amendment."

*footnote 2 continued at bottom of page 2

 DRAFT

H.R. 3932 would permit the District of Columbia ("D.C.") City Council to pass laws amending Titles 22, 23 and 24 of the District of Columbia Code ("D.C. Code"), which relate to the criminal law, criminal procedure and prisoners with Congress and the President able to overturn such action only by passage by Congress and enactment of a joint resolution. Because we believe that amendments to these titles should remain the initial perogative of the Congress and its legislative process, we must object to the bill as drafted.

SUBSTITUTE INSERT

~~Under the Constitution, Congress has the exclusive power to legislate for the District of Columbia. Art. I, §8, cl. 17. Pursuant to this authority Congress has enacted Titles 22, 23 and 24 of the D.C. Code. In furtherance of this authority,~~ the Department of Justice, through the United States Attorney for the District of Columbia, has been vested with the prosecutive authority in the United States District Court and the District of Columbia Superior Court. D.C. Code §23-101. Indictments are sought, and prosecutions pursued, in the name of the United States of America. Similarly, this Department, through the U.S. Marshal for the District of Columbia, conducts the service of criminal process, provides court room security, transports prisoners and returns to the District of Columbia defendants arrested in other jurisdictions and wanted for prosecution in the District of Columbia. The U.S. Marshals Service utilizes its authority under law to serve Superior Court felony subpoenas anywhere in the United States. D.C. Code §11-942. Finally, all persons convicted in the District of Columbia are committed to the custody of the Attorney General, who, through the Department's Bureau of Prisons, designates the place of confinement. D.C. Code §24-425. 3/

Footnote 2 continued

(2) Section 602(c)(1) provides that with respect to acts effective immediately due to emergency circumstances and acts proposing amendments to Title IV of this Act "no such act shall take effect until the end of the 30-day period . . . and then only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act."

(3) Section 602(c)(2) provides that any Act affecting Title 22, 23, or 24 of the District of Columbia Code "shall take effect . . . only if . . . one House of Congress does not adopt a resolution disapproving such act."

(4) Section 740(a) provides that either the House or the Senate may adopt a resolution terminating emergency presidential authority over the Metropolitan Police Department.

3/ By agreement with the Government of the District of Columbia most District of Columbia prisoners are sent to the Lorton Reformatory.

DRAFT

The Superior Court of the District of Columbia, where jurisdiction for local offenses rests, is a federal court created pursuant to Article I of the Constitution. Palmore v. United States, 411 U.S. 389, 397 (1973). The judges of the Superior Court and the Court of Appeals are appointed by the President. D.C. Code §§11-102, 11-301, 11-1501(a) and 11-1502. A single jury system for grand and petit juries serve both the Superior Court and Federal District Court. A grant jury of one court may return indictments in the other. D.C. Code §§11-1902, 11-1903(a).

This involvement of the federal interest in the prosecuting and judicial elements of the District of Columbia support the principle that the substantive laws which these entities must enforce and interpret remain within the initial discretion of the Congressional legislative process. This principle recognizes nothing more than what is reflected in the present laws, including the Home Rule Act.

~~As the Supreme Court, the Congress and the Executive Branches are located in the District of Columbia, it is truly the seat of the nation's government.~~ The federal government owns approximatley 41% of all land in the District. Over 200 buildings are owned or leased by the federal government. Over 445,000 federal employees work in the Washington Metropolitan area. As a result, the District draws both the nation's citizens and those of other countries for purposes ranging from conducting business with the federal government to touring the capital. Moreover, the sizable diplomatic community ~~reasserts the need for the three branches of government to be accountable for~~ the enactment, enforcement and interpretation of the criminal laws governing the District.

~~Exempting criminal law, its procedure, and prisoners from H.R. 3932's mechanism of Congressional review is not inconsistent with the intent of the Home Rule Act. Maintaining Congress's authority in this area is established in both the law itself and its legislative history.~~ Specifically, in only one area did Congress reserve to itself to veto by vote of only one House the acts of the City Council - Title 22, 23 and 24 of the D.C. Code. Home Rule Act §602(c)(2). See also H.R. Rep. No. 482, 93d Cong., 1st Sess. (1983). In fact, the original bill, as passed by the House of Representatives, prohibited the soon to be established Council from legislating in the criminal law area. H.R. 9682, 93d Cong., 1st Sess., §602(a)(8) (1973). The Senate

The federal government is, accordingly, deeply interested in the prosecution of crimes under the D.C. Code, their determination before the courts, and the handling of prisoners convicted under the Code.

-cates a other federal interest in

Special treatment for Titles 22, 23 and 24 is consistent with the existing Home Rule Act and its legislative history.

DRAFT

version contained no such prohibition. S. 1435, 93d Cong., 1st Sess. (1973). The conference version represented a compromise by inserting a one house veto. Pub.L. No. 93-198, §602(c)(2), 87 Stat. 774 (1973). 4/

Our concerns in these areas do not take place in a vacuum. Presently before the D.C. Council are three bills, Bill 5-16, the Parole Act of 1983, Bill 5-244, the Prison Overcrowding Emergency Powers Act of 1983, and Bill 5-245, the District of Columbia Sentencing Improvements Act of 1983, which raise substantial concern. Bill 5-16 would reduce the minimum period of detention to 10 years and would be applicable to individuals incarcerated for such crimes as rape, murder and armed offenses. Bill 5-244 would permit, as a means of budget control, the release into the community of convicted individuals. Bill 5-245 would expand the time for granting a motion to reduce a sentence from 120 days to one year. While this Department has strongly opposed these proposals, see attached Statement of Stanley S. Harris, United States Attorney for the District of Columbia, before the City Council of the District of Columbia (October 3, 1983), we believe more importantly that Congress, through its legislative process, should actually determine the wisdom of such proposals. 5/

As this Department has previously stated, the ramifications of the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983), require all parties as to review carefully the particular provisions of law at

---

4/ We also note that during the first two years subsequent to the effective date of the Home Rule Act the Council was prohibited from legislating in this area while a study of the District of Columbia Criminal Code was undertaken for the Congress. This was later extended to four years. See §§602(a)(9) and 602(c)(2) of the Home Rule Act.

5/ In 1981, the D.C. Council passed a Sexual Assault Reform Act. Among its provisions was one which lowered the age of consent for minors in statutory rape cases. Another provision would have reduced the sentence for both forcible and statutory rape from life to a maximum of 20 years. The penalty for incest was reduced. The proposal also reduced the penalty for forcible rape to a 10 year maximum if the victim was physically or mentally incapable of consenting or resisting. The House of Representatives passed a resolution disapproving the proposal. H. Res. 208, 97th Cong., 1st Sess., 127 Cong. Rec. H6762 (1981).

DRAFT

stake. 6/ It is this Department's sincere belief that the interests of both the District of Columbia and the nation as a whole are better served by ~~reserving to the Congress and its legislative process the perogative to amend the laws of the District of Columbia with respect to crime, criminal procedure and prisoners.~~ We must stress that there is no inherent conflict between the District and federal governments. The issues in H.R. 3932 result more from the unique federal and district relationship embodied in present law. This Department values its representation of the citizens of the District of Columbia and share their goal of ensuring that a fair, efficient and effective criminal justice system be in place. ~~We believe that the Congressional legislative process is more than competent to consider the various issues at stake in the matter. Accordingly, we oppose enactment of H.R. 3932 unless it is amended to reserve to Congress the right to amend Titles 22, 23 and 24 of the District of Columbia Code.~~ 7/

continuing the special treatment accorded Titles 22, 23 and 24 in the Home Rule Act in a manner consistent with the Supreme Court's decision in INS v. Chadha.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

In conclusion, we support enactment of H.R. 3932 provided it is amended consistent with the views expressed in this letter.

Attachment

6/ See Statement of Edward C. Schmults, Deputy Attorney General before the Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives (July 18, 1983).

7/ We are sensitive to the need of the District of Columbia to have the ability to raise revenues through the municipal bond market. Section (1)(i) of H.R. 3932 is directed toward ratifying previous actions of the D.C. Council with respect to these bonds. We would suggest, however, that section (1)(i) be clarified so as not to infer that actions of the D.C. Council which were subject to a Congressional resolution as a result of the provisions of the Home Rule Act are ratified.

never became effective because they

U.S. Department of Justice

Office of Legislative Affairs

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

M E M O R A N D U M

November 10, 1983

TO: Joseph F. diGenova
Principal Assistant U.S. Attorney
District of Columbia

John Roberts
Assistant Counsel to the President
The White House

Jay Stephens
Deputy Associate Attorney General

FROM: Michael W. Dolan
Deputy Assistant Attorney General
Office of Legislative Affairs

SUBJECT: H.R. 3932 - D.C. Home Rule Amendments

Attached for your review and approval is a revised copy of the Department's proposed report on H.R. 3932, the D.C. House Rule amendments. Please telephone any comments to me (633-4787) or John Logan (633-2078) as soon as possible.

D.C emergency bill ?

DRAFT

Honorable William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Pursuant to your request, this letter presents the views of the Department of Justice on H.R. 3932, a bill "to amend the District of Columbia Self-Government and Governmental Reorganization Act, and for other purposes," as passed by the House of Representatives on October 4, 1983. We oppose the enactment of this legislation unless it is amended consistent with the discussion set forth below.

H.R. 3932 would amend the District of Columbia Self-Government and Governmental Reorganization Act, Pub.L. 93-198, 87 Stat. 774 (1973), as amended, ("~~Home Rule~~ Act"). The legislation is in response to the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983), which struck down as unconstitutional so-called "legislative veto" devices. 1/ The ~~Home Rule~~ Act contains several such devices purporting to authorize Congress to disapprove actions of the District of Columbia Government without complying with the constitutional requirements for legislation. 2/

1/ The Supreme Court has also affirmed the invalidity of two other two other legislative veto provisions. See Process Gas Consumers Group v. Consumers Energy Council of America, 103 S.Ct. 3556 (1983), affirming Consumers Energy Council of America v. FERC, 673 F.2d 425 (D.C. Cir. 1982), and Consumers Union, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982).

2/ The Home Rule Act contains four provisions which may be characterized as legislative vetoes. These are:

(1) Section 303(b) provides that "an amendment to the charter . . . shall take effect only if . . . both Houses of Congress adopt a concurrent resolution . . . approving such amendment."

*footnote 2 continued at bottom of page 2

DRAFT

The Administration generally supports the approach of H.R. 3932, which would correct the constitutionally invalid portions of the ~~Home Rule~~ Act by requiring congressional action disapproving acts passed by the D.C. City Council to take the form of legislation passed by both Houses and presented to the President for approval or disapproval. In one narrow area, however, the Administration believes that it would be more consistent with Congress' prior treatment under the ~~Home Rule~~ Act to require affirmative approval of acts passed by the D.C. City Council rather than an opportunity for disapproval. We recommend that H.R. 3932 be amended to provide that City Council laws amending Titles 22, 23 and 24 of the District of Columbia code -- which relate to criminal law, criminal procedure, and prisoners -- only take effect upon passage by Congress of a joint resolution of approval. This approach will cure the constitutional infirmities pointed out by the Chadha decision, while retaining the special treatment accorded Titles 22, 23, and 24 under the ~~existing Home Rule~~ Act.

Under the Constitution, Congress has the exclusive power to legislate for the District of Columbia. Art. I, §8, cl. 17. Pursuant to this authority Congress has enacted Titles 22, 23 and 24 of the D.C. Code. The Department of Justice, through the United States Attorney for the District of Columbia, has been vested with the prosecutive authority in the United States District Court and the District of Columbia Superior Court. D.C. Code §23-101. Indictments are sought, and prosecutions pursued, in the name of the United States of America. Similarly, this Department, through the U.S. Marshal for the District of Columbia, conducts the service of criminal process, provides court room security, transports prisoners and returns to the District of Columbia defendants arrested in other jurisdictions and wanted for prosecution in the District of Columbia. The U.S. Marshals Service utilizes its authority under law to serve Superior Court felony subpoenas anywhere in the United States.

Footnote 2 continued

(2) Section 602(c)(1) provides that with respect to acts effective immediately due to emergency circumstances and acts proposing amendments to Title IV of this Act "no such act shall take effect until the end of the 30-day period . . . and then only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act."

(3) Section 602(c)(2) provides that any Act affecting Title 22, 23, or 24 of the District of Columbia Code "shall take effect . . . only if . . . one House of Congress does not adopt a resolution disapproving such act."

(4) Section 740(a) provides that either the House or the Senate may adopt a resolution terminating emergency presidential authority over the Metropolitan Police Department.

D.C. Code §11-942(b). Finally, all persons convicted in the District of Columbia are committed to the custody of the Attorney General, who, through the Department's Bureau of Prisons, designates the place of confinement. D.C. Code §24-425. 3/

The Superior Court of the District of Columbia, where jurisdiction for local offenses rests, is a federal court created pursuant to Article I of the Constitution. Palmore v. United States, 411 U.S. 389, 397 (1973). The judges of the Superior Court and the Court of Appeals are appointed by the President. D.C. Code §§11-101, 11-102, 11-301, and 11-1501(a). A single jury system for grand and petit juries serve both the Superior Court and Federal District Court. A grand jury of one court may return indictments in the other. D.C. Code §§11-1902, 11-1903(a). The federal government is, accordingly, deeply interested in the prosecution of crimes under the D.C. Code, their determination before the courts, and the handling of prisoners convicted under the Code.

The federal government owns approximately 41% of all land in the District. Over 200 buildings are owned or leased by the federal government. Over 445,000 federal employees work in the Washington Metropolitan area. As a result, the District draws both the nation's citizens and those of other countries for purposes ranging from conducting business with the federal government to touring the capital. Moreover, the sizable diplomatic community reasserts a federal interest in the enactment, enforcement and interpretation of the criminal laws governing the District.

Special treatment for Titles 22, 23 and 24 is consistent with the ~~existing Home Rule~~ Act and its legislative history. Specifically, in only one area did Congress reserve to itself to veto by vote of only one House the acts of the City Council - Title 22, 23 and 24 of the D.C. Code. Home Rule Act §602(c)(2). See also H.R. Rep. No. 482, 93d Cong., 1st Sess. (1973). In fact, the original bill, as passed by the House of Representatives, prohibited the soon to be established Council from legislating in the criminal law area. H.R. 9682, 93d Cong., 1st Sess., §602(a)(8) (1973). The Senate version contained no

3/ By agreement with the Government of the District of Columbia most District of Columbia prisoners are sent to the Lorton Reformatory.

DRAFT

such prohibition. S. 1435, 93d Cong., 1st Sess. (1973). The conference version represented a compromise by inserting a one house veto. Pub.L. No. 93-198, §602(c)(2), 87 Stat. 774 (1973). 4/

Our concerns in these areas do not take place in a vacuum. Presently before the D.C. Council are three bills, Bill 5-16, the Parole Act of 1983, Bill 5-244, the Prison Overcrowding Emergency Powers Act of 1983, and Bill 5-245, the District of Columbia Sentencing Improvements Act of 1983, which raise substantial concern. Bill 5-16 would reduce the minimum period of detention to 10 years and would be applicable to individuals incarcerated for such crimes as rape, murder and armed offenses. Bill 5-244 would permit, as a means of budget control, the release into the community of convicted individuals. Bill 5-245 would expand the time for granting a motion to reduce a sentence from 120 days to one year. While this Department has strongly opposed these proposals, see attached Statement of Stanley S. Harris, United States Attorney for the District of Columbia, before the City Council of the District of Columbia (October 3, 1983), we believe more importantly that Congress, through its legislative process, should retain the opportunity to review the wisdom of such proposals. 5/

As this Department has previously stated, the ramifications of the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 103 S.Ct. 2764 (1983), require all parties to review carefully the particular provisions of law at stake. 6/ It is this Department's sincere belief that the interests of both the citizens of the District of Columbia and the nation as a whole are better served by continuing the special treatment

---

4/ We also note that during the first two years subsequent to the date which elected members of the initial Council took office, the Council was prohibited from legislating in this area while a study of the District of Columbia Criminal Code was undertaken for the Congress. This was later extended to four years. See §§602(a)(9) of the ~~Home Rule~~ Act.

5/ In 1981, the D.C. Council passed a Sexual Assault Reform Act. Among its provisions was one which lowered the age of consent for minors in statutory rape cases. Another provision would have reduced the maximum sentence for both forcible and statutory rape from life to 20 years imprisonment. The penalty for incest was reduced. The proposal also reduced the penalty for forcible rape to a 10 year maximum if the victim was physically or mentally incapable of consenting or resisting. The House of Representatives passed a resolution disapproving the proposal. H. Res. 208, 97th Cong., 1st Sess., 127 Cong. Rec. H6762 (1981).

6/ See Statement of Edward C. Schmults, Deputy Attorney General before the Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives (July 18, 1983).

DRAFT

accorded Titles 22, 23 and 24 in the Home Rule Act in a manner consistent with the Supreme Court's decision in INS v. Chadha. We believe that the primary responsibility of the Congress and the President should be maintained in this area. This responsibility can be preserved by requiring a joint resolution of approval for D.C. Council amendments to Titles 22, 23, and 24 of the D.C. Code. We must stress that there is no inherent conflict between the district and federal governments. The issues in H.R. 3932 result from the unique federal and district relationship embodied in present law. This Department values its representation of the citizens of the District of Columbia and share their goal of ensuring that a fair, efficient and effective criminal justice system be in place. In conclusion, we oppose enactment of H.R. 3932 unless it is amended consistent with the views expressed in this letter. 7/

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Robert A. McConnell
Assistant Attorney General

Attachment

7/ We are sensitive to the need of the District of Columbia to have the ability to raise revenues through the municipal bond market. Section (1)(i) of H.R. 3932 is directed toward ratifying previous actions of the D.C. Council with respect to these bonds. We would suggest, however, that section (1)(i) be clarified so as not to infer that actions of the D.C. Council which never became effective because they were subject to a Congressional resolution as a result of the provisions of the ~~Home Rule~~ Act are ratified.

PREPARED STATEMENT OF
STANLEY S. HARRIS,
UNITED STATES ATTORNEY FOR
THE DISTRICT OF COLUMBIA,
ON BILLS 5-16, 5-244, and 5-245
OCTOBER 3, 1983

This written statement is submitted to explain in some detail my reasons for testifying in opposition to the passage of Bill 5-16, the Parole Act of 1983; Bill 5-244, the Prison Overcrowding Emergency Powers Act of 1983; and Bill 5-245, the District of Columbia Sentencing Improvements Act of 1983.

Let me begin by stressing what I consider to be one of the key roles of the United States Attorney as the prosecutor of adult crimes in the District of Columbia. There is in our city an organization, financed by the taxpayers, called the Public Defender Service. It is a fine organization, performing a needed service. However, its name is somewhat misleading, for it does not represent the public. Rather, it represents a relatively small percentage of the criminal defendants in our city -- typically, as a matter of fact, recidivists. The public -- that is, the law-abiding citizens who must be protected against the criminal element in our midst and who all too often become victims of crime -- must be and is represented by the prosecutors of the United States Attorney's Office.

Perhaps the best way to make my initial point is to quote from an article on the editorial page of the Wall Street Journal which was written nearly a year ago about criminal trials. The author of that article, Vermont Royster, stated in relevant part as follows:

> What has happened to the law, I think, is a forgetfulness that there are two parties in every criminal trial. One is the accused, a real person easily visible. The other is "the state," a seemingly impersonal and institutional entity. An injustice to the individual is readily understood. Injustice to "the state" is not so readily recognized. To many, including lawyers, a "fair trial" has come to mean only fair to the accused; fairness to the other party is forgotten.
>
> Yet that entity "the state" is not only all of us but each of us. The person called the prosecutor is in fact a public defender. His task is to try to make our homes and streets safer by

> removing from society those who 12 ordinary citizens decide have been guilty of injury to one or more members of society.

My 182 Assistant United States Attorneys and I fully endorse those observations. So that, as my sons would say, is where I am coming from today. I am here with pre-eminent concern for the victims of crime -- past, present, and future.

I do not like saying what I feel obliged to say today. I would like to speak glowingly of law enforcement successes. I would like to say that our so-called correctional institutions have a meaningful number of people in them who are there needlessly and who are ready to become productive members of society. I cannot do so. The unfortunate but inescapable truth is that we have not too many in our prison facilities but too few.

In giving this testimony, it is our purpose to recite considerable statistical information which, while imperfect, does present a striking overview of what is happening in our criminal justice process. In doing so, I express appreciation to the Department of Corrections for making considerable information available to us for analysis.

I must advise you of my personal, and my Office's institutional, conviction that the problem that the District of Columbia currently is facing is not one of "prison overcrowding," but one of "prison undercapacity." The facts are that those who are incarcerated should be incarcerated, the citizens of this community justifiably desire that they remain incarcerated, and prison expansion is the only proper solution to the problem. This Council would not be acting responsibly if it legislated to achieve the premature release of repeat and dangerous offenders into the law-abiding community by passing the three Bills that are the subject of this hearing.

The appropriateness of characterizing the problem as one of "prison undercapacity" becomes clear when one takes a close look at those who are incarcerated and the reasons for their confinement. Dangerous and repeat offenders permeate our prison population. Statistics generated by the Department of Corrections confirm that fact. The average sentence being served by inmates committed to Lorton Reformatory in 1982 was substantial: that average was 2-3/4 years to 11-1/2

years. During the first quarter of 1983, the average sentence of those committed to Lorton jumped to from 4-1/2 years to just over 14 years. Further, in 1982, approximately 32% of the inmates were sentenced to consecutive terms of imprisonment, an additional 21% of the inmates were serving concurrent time on multiple counts, and approximately 16% of the inmates had detainers pending against them for other crimes charged in this or other jurisdictions. Data on the past criminal history of inmates unfortunately is not kept by the Department of Corrections, but experience dictates, and the above figures confirm, that virtually all of those incarcerated at Lorton are recidivists.

That the inmates at Lorton are dangerous is clear from the types of crimes for which they are incarcerated. In 1982, 45.6% of the newly-committed inmates were incarcerated for crimes against persons, and during the first quarter of 1983 that figure jumped to 52%. Armed robbers comprised 56.9% of those incarcerated for personal crimes in 1982; during the first three months of 1983 they comprised 67% of the same population. Persons convicted of drug abuse, burglars, thieves, and weapons offenders, in that order, accounted for an additional 46% of the total prison population. The remaining prisoners were incarcerated for other offenses, which include bail jumping and escape. When the intimate connection between drug and weapons offenses and other crimes is factored into these figures, the serious and violent nature of virtually all of the inmates cannot be disputed.

The above statistics represent defendants committed to Lorton for the first time for a particular offense. Convicts who were <u>recommitted</u> to Lorton for parole violations, halfway house and work release violations, and escapes, represented approximately 40% of inmate admissions. This fact serves to verify that those incarcerated should remain there as ordered by conscientious judges for the good of the community and for the safety of potential innocent victims.

I recognize that a number of offenders affected by the Bills before this Council currently are incarcerated at Occoquan, a small step admirably taken to help relieve overcrowding at Lorton. Although intended to house only misdemeanor convicts, Occoquan also holds convicted felons. In 1982, 83.3% of the Occoquan residents had been convicted of assault, grand theft, weapons, drug, and other serious offenses. Bail violators, parole violators, and fugitives accounted for an additional 2.5% of the population. Of those inmates at Occoquan, 75.4% previously had been committed to the Department of Corrections, and 35% were there on drug convictions. Thus,

it is only sensible to conclude that most of those at Occoquan are serious offenders. Moreover, experience reveals that all of the committed offenders are recidivists, for the alternatives of pretrial diversion, the Federal Youth Corrections Act, and probation literally without exception have been exhausted before a Court has determined that incarceration is the appropriate remedy to achieve the inescapable goals of deterrence and punishment.

The D.C. Jail also houses many sentenced offenders who would be affected by passage of the Bills before the Council. Sentenced felons comprise over 25%, and sentenced misdemeanants comprise only 11%, of the current population of the jail. Most of these are awaiting transfer to Occoquan or Lorton, and the available information reveals that many are serious -- and virtually all are repeat -- offenders. Further, the vast majority are drug abusers. A recent Washington Post article indicated that as many as 76% of the inmates at the D.C. Jail were drug abusers (during a time in which the City was not cracking down in any concentrated way on drug offenders).

One point cannot be overemphasized. When prison needs were projected two or three decades ago, not even the wildest pessimist could have predicted the extraordinary extent to which narcotics and narcotics-related offenses would swell both our incidence of criminal offenses and our prison populations. Today, the intimate connection between drug abuse and other serious criminal activity is well established. Recent studies have shown that large numbers of incarcerated offenders were under the influence of drugs when they committed their crimes, and that heroin addicts -- of which the District of Columbia has far more than its share -- commit six times as many crimes during periods of addiction as during periods of abstinence. Thus it is deplorable but not surprising that 80% of the offenders committed to the Lorton Youth Center admit to having abused drugs. This very serious problem should be addressed by the Council, but prematurely turning convicted abusers out on the streets is not a tolerable solution.

The extent to which incarcerated persons already are being returned to society at an early date should be recognized. In 1982, the Board of Parole released 61% of all prisoners at their first hearing dates, and 73% of the remainder were released at their second hearing dates. As might be expected, in a recent study by the Board of Parole which was designed to evaluate the success or failure of prisoners released to parole supervision, the authors found

that 52% of parolees incurred new arrests during the two-year period following their release.*/ Eighty percent of those rearrested subsequently were convicted. Of additional interest is the further finding that of those who sustained convictions while on parole, more than one-half never had their parole revoked, and remained on the streets of this community pending their new convictions. Thus, an unacceptably high number of offenders who are on parole are continuing to victimize law-abiding citizens, and to add to their number by prematurely releasing others would only exacerbate the situation.

In light of all of the above, it is evident that our jail and prisons house dangerous and repeat offenders, many of whom maintain dangerous drug habits, and almost all of whom must remain incarcerated with their normal release dates if anything more than lip service is to be paid to ensuring community safety.

Next, it is important to emphasize that the citizens of this City, who comprise the Council's and my own constituency, want serious offenders to remain incarcerated. Their concerns were made clear by their overwhelming approval of the Mandatory Minimum Sentences Initiative which became law last June. They also have supported recent police efforts to apprehend repeat and serious offenders, and are participating in growing numbers in neighborhood crime watch programs. The Council would be showing disdain for these efforts if it enacted the proposed Bills.

Further, much public and private effort and money have been expended in order to identify, apprehend, and convict serious offenders. This investment of time and money should not be wasted by releasing those offenders prematurely. Such a result would be inconsistent with the popular view that violent and dangerous offenders should be incarcerated, as evidenced also by the strong support shown for the bail law amendments which were passed unanimously by this Council 15 months ago.

---

*/ Of those, 25% were rearrested between 1 to 4 months of parole, 56% were rearrested within 8 months of their parole, 79% were rearrested within a year, and only 21% lasted at least 13 months without being rearrested.

Given this expressed concern, it should be no surprise that the citizens would be willing to foot the bill to keep dangerous recidivists off the streets. As do you, we have frequent contacts with citizens and community leaders. It is our conclusion that they virtually unanimously support the appropriation of public funds to increase jail capacity. I would willingly join with the Council in posing the issue directly to the citizens of this City, and I would live (happily, I am confident) with the results. Moreover, such expenditures ultimately would be returned to the City many times over if the streets were made safer for businesses on which to operate and for individuals to enjoy.

Additionally, to release criminals prematurely is to buck the current local and national trend to treat crime victims, both actual and potential, with more compassion. The majority of released criminals currently victimize others shortly after their release; their premature release thus would create proportionately more victims. Not only is this result unacceptable to the reasonable person; it is contrary to the expressed intent of this Council in proposing and passing several victims rights bill, two of which are scheduled to be heard in two weeks, on October 17, 1983.

In sum, any measure which would result in the premature release of serious offenders would make a mockery of citizen efforts to improve the safety of their community, would be inconsistent with other actions taken by this Council, and would contradict common sense.

It is thus clear that the problem of prison undercapacity can be solved only by building or acquiring more prison space, and this is a solution that not only is attainable, but that is directly supported by the Congress of the United States, which only last week appropriated more than $20 million for added prison facilities. In the recent past, due to the growing crime rate, the criminal justice system has been supplied with additional judges, additional prosecutors, additional support personnel, and additional court facilities. Despite those facts, little additional prison space has been provided to house the additional criminals which inevitably have been caught, prosecuted, and incarcerated. This situation cries out for correction.

It should be noted that our jail is crowded with inmates who properly should be in a prison facility. Data developed by the Department of Corrections reveals that in 1982, an average of 482 inmates, or 25.1% of the total jail

population, were sentenced felons. An additional average of 212 prisoners, or 11.1% of the total jail population, were sentenced misdemeanants. These inmates should have been sent to a correctional, instead of to a detention, facility. If that had occurred, the jail (by its own figures) would have been underpopulated. We believe that this situation remains unchanged in 1983.

Further, it is significant to note that, contrary to the belief of some, the jail is not full of pretrial detainees. Jail authorities unfortunately do not keep precise statistics, but a substantial number of the unsentenced offenders actually have been convicted but remain in jail awaiting sentence. Therefore, the percentage of unsentenced offenders who are detained awaiting trial should be very small -- probably less than 10% of all defendants awaiting trial. Moreover, under the current bail laws, almost all of those are violent, dangerous, and/or repeat offenders.

Some have suggested that because recent crime statistics seem to indicate that reported crime has decreased slightly, no new measures need be taken to expand prison capacity. Initially, I would point out that the figures reflect only the reported crime rate, and it is commonly accepted that 50 to 70% of the crime in any large urban area goes unreported. Beginning, however, with the reported crime rate, the Metropolitan Police Department's own statistics reveal that in 1982 they "closed," by identifying the assailant, only 57.5% of the murders, 64.3% of the forcible rapes, 20.8% of the robberies, 65.6% of the aggravated assaults, and 13.2% of the burglaries which were committed and reported. These numbers do not reflect accurately the percentage of criminals actually caught, however, because the Police Department considers a case "closed" if only one of several perpetrators is identified, and in a significant number of cases, identification does not correlate with arrest. In sheer numbers, the Police Department reported that in 1982 it "closed" 127 out of 221 reported murders, 285 out of 443 reported rapes, 2,040 out of 9,799 reported robberies, 2,332 out of 3,553 aggravated assaults, and 2,071 out of 15,682 reported burglaries.

Of the 221 reported homicides, only 61 guilty judgments were entered, with 33 cases remaining open. Thus, in less than 30% of the reported homicides was the murderer ever held accountable for his actions. Further, of the 443 reported rape offenses, only 76 guilty findings were obtained. Of the frightening total of 9,799 reported robberies, only 706 defendants were held accountable. For the offense of aggravated assault, only 182 defendants were found guilty out of 3,553 reported cases, and for the offense of burglary, only

419 guilty judgments were entered out of a total of 15,682 reported cases. Moreover, it is unquestionably true that a large percentage of those convicted received probation, and that less than half of them went to jail. In short, of the total number of persons who commit crimes in this City, only 20 to 50% have their criminal activities reported, only 10 to 20% are identified, less than 5% are convicted, and less than 3% are incarcerated. Thus, it is clear that of the large number of serious offenders in this City, only an infinitesimal percentage actually are incarcerated for their crimes. To strive artificially through legislative fiat to reduce this number manifestly is absurd, for that percentage is, in my view, an irreducible minimum.

Also illustrative of the continuing serious nature of the crime problem in this City are the increases in the reported incidents of armed robbery, robbery, and drug offenses. Over the last five years the number of adults arrested for armed robbery increased from 721 in 1978 to 896 in 1981, with the 1982 statistics showing a slight decline to 805. The number of adult arrests for unarmed robberies increased steadily from 849 in 1978 to 1,097 in 1981, with the 1982 figures showing a slight decrease to 1,014. For felony drug offenses, the numbers have risen steadily from 169 arrests in 1978 to 2,353 in 1982. An additional 4,641 misdemeanor drug arrests were made in 1982.

Insofar as the number of cases indicted may provide a more accurate forecast of the future prison population, the statistics for the key offenses of armed robbery and drug abuse are both informative and staggering. In 1978, 372 defendants were indicted for armed robbery, and 124 defendants were indicted for drug offenses. In 1982, 561 defendants were indicted for armed robbery, and 863 defendants were indicted for drug offenses.

It is therefore evident that any slight decrease in the amount of reported dangerous and violent crime in this City will have no long-term effect on the prison population, and should not be used as an excuse to ignore the problem of prison undercapacity. Similarly, discussions of alternative sentencing and diversion beg the issue. Alternative sentencing is a tool which currently is frequently used by judges in appropriate cases, and our Office already is exercising pre-trial diversion for virtually every eligible defendant. Further, as stated above, most, if not all, of those sentenced to incarceration previously have been granted forms of diversion and probation. (Literally the only exception to the sequential diversion and probation route prior to incarceration is the first-degree murderer, who may have no prior record but who faces a mandatory sentence of 20 years to life.)

Focusing specifically on the three Bills before the Council today, I must urge the Council to defeat each one. The "Parole Act of 1983," Bill 5-16, introduced by Councilmember Ray, proposes to release exactly those violent and dangerous criminals who should remain incarcerated for a more substantial period of time by reducing the minimum period of detention to 10 years. Those inmates who are incarcerated for more than a minimum of 10 years are murderers, rapists, and armed offenders. This Bill would advance most of their release dates by at least four to five years, and, as statistics prove that the majority of those released will victimize others relatively soon after release, passage of the Bill would pose a clear and present danger to the community.

Moreover, I am obliged to point out that technically the Bill may not accomplish what it supposedly is intended to achieve. The preamble to the Bill states that it intends "to require that all prisoners become eligible for release on parole after having served ten years . . . " (emphasis added), but, in our view, it would not apply to first-degree murder convictions. 22 D.C. Code § 2404(b) states that "notwithstanding any other provision of law," a person convicted of first-degree murder must serve a minimum of 20 years. Additionally, it is questionable whether the Bill's terms would apply to prisoners serving consecutive sentences totaling more than 10 years. (We believe that they would not.) Of course, I am not advocating that this Bill be amended to include persons convicted of premeditated first-degree murder or to prisoners serving substantial consecutive sentences, but rather that it be defeated in its entirety.

Concerning the "Prison Overcrowding Emergency Power Act of 1983," Bill 5-244, also introduced by Councilmember Ray, I note that it would allow the Mayor, as a means of budget control, to release dangerous prisoners into the community. Reduced to its essence, this Bill would sacrifice the safety of the community on the altar of fiscal irresponsibility.

There are other problems inherent in the Bill which should cause it to fail of passage. The Bill provides for repeated acts of reducing sentences by 90 days, even for persons who have no chance of being released immediately as a result. For those prisoners who are not within 90 days of parole eligibility, who indeed may be eight to ten years away from parole eligibility, the existence of an undefined "emergency" would result in reducing their ultimate sentences for no good reason, and would not assist in solving the immediate problem of reducing prison congestion.

The third piece of legislation under consideration, the "District of Columbia Sentencing Improvements Act of 1983," Bill 5-245, introduced by Councilmember Rolark, is unwise and probably illegal. In extending the time for granting a motion to reduce sentence from 120 days to one year, following what ultimately could be a denial of a petition for a writ of certiorari to the Supreme Court years after conviction, this Bill would make a mockery of the time-honored concept of certainty in sentencing, and would undermine the very purpose of deterrence that underlies the act of sentencing. The Supreme Court has spoken clearly about the need for finality in all legal, and especially criminal, proceedings, most recently in deciding death penalty cases. If this Bill passes, defendants will be on notice that the criminal justice system in the District of Columbia may be manipulated to exact minimal punishment, and the deterrent effect of other actions taken by this Council will deteriorate.

Additionally, this Bill would tie up scarce judicial resources at late stages of criminal proceedings, and would detract from recent efforts to afford defendants not yet convicted more speedy trials. I doubt that the Council seriously desires this result.

Moreover, a motion to reduce sentence is not designed to be used as a tool to reduce the number of criminals incarcerated. The caselaw is clear that a motion to reduce sentence properly is to be filed only to allow a court to reconsider its sentencing decision in light of the factors present at the time of sentencing, and not in light of a prisoner's artificial conduct in the early stages of his incarceration. An offender's conduct in prison properly is a subject of consideration by the parole board, and not by the sentencing judge.

Finally, and decisively, this Bill erroneously assumes that the Council has the power to amend the Superior Court Rules which govern the filing of sentence reduction motions. Section 946 of Title 11 of the D.C. Code states that the Federal Rules of Criminal Procedure shall apply in Superior Court except as otherwise authorized by the District of Columbia Court of Appeals. The Home Rule Act provides that the Council of the District of Columbia may not alter Title 11. District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code, Title VI, § 602(a)(4). Therefore, any amendment to the Superior Court Rules requires action by the judges themselves, and any legislation by the Council on this matter would be inappropriate. Nonetheless, I note that the Federal Criminal Rule 35 has been amended to allow greater flexibility, and our courts now are studying the situation.

All three of these Bills thus are based upon the wrong premise -- that convicted serious offenders should be released prematurely for budgetary reasons -- rather than on the correct premise that convicted serious offenders, who at great expense to this City have been apprehended and prosecuted, should be treated and kept in a secure facility for as long as the sentencing judges found appropriate and necessary. Hard statistics prove that premature release results in creating untold numbers of new victims, and to accept this result would be to ignore the citizens' mandate to make their streets, homes, and businesses as safe as possible. It is time for the District of Columbia government to recognize both the realities of the situation and the will of its constituents, to bite the proverbial bullet, and to provide more facilities to solve the problem of prison undercapacity. As I have noted, that task was aided by the fact that just last week, the Congress of the United States appropriated more than $20 million for that purpose. Maximum effective use should be made of those funds, and the Council -- as should the Executive Branch -- should deal realistically with the existing problems.

It does not please me to bring to light the realities of our relative lack of law enforcement success in today's world, in which the cancer of narcotics and narcotics-related crime is eating away at the very fabric of our social institutions. I would serve this distinguished body poorly, however, were I to do otherwise. It is axiomatic that a large amount of crime today is committed by a disproportionately small number of chronic offenders. Once such offenders have been brought to justice, it defies reason to support their premature release for purely budgetary reasons. No one can be unaware of the dramatic increase in recent years of dead-bolt locks, alarm systems, and barred windows and doors. It is the law-abiding citizens of the Nation's Capital, rather than its criminal element, who deserve the full support of the Council.